1-1-2000

# Nativism, Terrorism, and Human Rights -- The Global Wrongs of *Reno v. American-Arab Anti-Discrimination Committee*

Berta E. Hernández-Truyol
*University of Florida Levin College of Law*, hernandez@law.ufl.edu

# NATIVISM, TERRORISM, AND HUMAN RIGHTS—THE GLOBAL WRONGS OF *RENO V. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE*

by Berta Esperanza Hernández-Truyol*

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the golden door![1]

> Wide open and unguarded stand our gates, And through them press a wild motley throng . . . bringing with them unknown gods and rites . . . . In street and alley what strange tongues are loud, Accents of menace alien to our air, Voices that once the Tower of Babel knew! O Liberty, white Goddess! is it well to leave the gates unguarded?[2]

---

* Professor of Law, University of Florida, Levin College of Law. LL.M. (1982), New York University; J.D. (1978), Union University, Albany Law School; B.A. (1974), Cornell University. Many thanks to Jennifer Joynt-Sánchez and Neera Anand for their research work on this Article.

1. Emma Lazarus, *The New Colossus*, *in* Emma Lazarus: Selections from Her Poetry and Prose 48, 48 (Morris U. Schappes ed., 1967) (poem engraved on plaque affixed to the base of the Statue of Liberty in 1903).

2. Thomas Bailey Aldrich, *Unguarded Gates*, *in* 2 The Writings of Thomas Bailey Aldrich 71, 72 (1897). *See also* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.").

> Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[3]

## I. INTRODUCTION

The popular narrative describing the United States' attitude concerning foreigners crossing into its territory is one of welcomeness. At first glance, Emma Lazarus's poem appears to give support to the popular tale. Indeed, the United States enjoys a lofty globally-recognized reputation as the land of opportunity. It is here that those who dream of freedom yearn to come. All aspiring newcomers imagine an open-arms warm and welcoming greeting at the shore; they envision unbounded wealth and resources that will make their futures safe, happy, free beautiful ones at home and at work, at school, and at prayer.

However, a closer scrutiny of the linguistic tropes deployed by the welcomeness narrative reveals the underlying disdain towards those who are different and desire to enter United States. In sharp contrast to the welcomeness narrative is the reality-based historic counter-narrative of a pattern and practice of racial, ethnic, and religious exclusion. The myth of welcomeness breaks down quickly when we consider the harsh description of these "huddled masses yearning to breathe free" as "wretched refuse."[4] Indeed, to describe some immigrants as "wretched refuse" unveils Lady Liberty's welcome as a myth—one in which the "refuse" are truly unwanted based on characteristics of their birth. Thus, notwithstanding Lazarus's attempt to describe the sentiments towards immigrants as warmly embracing—"give me your tired, your poor"—the Aldrich work is much

---

3. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)). It is significant that while there has been a historic distinction between exclusion and deportation (*see infra* note 76 and accompanying text), the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) has now replaced the different proceedings for exclusion and deportation with a "removal" proceeding that is both for deportation and admission (or a decision of inadmissibility). *See* Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a (Supp. IV 1998).

4. *See* Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, *in* Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 13, 39 (Juan F. Perea, ed. 1997) [hereinafter Immigrants Out!]. *See also* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, *in* Immigrants Out! 324, 324.

more attuned to, and reflective of, reality, particularly as manifested in the immigration laws of the United States as they apply to racial, ethnic, religious, and political "others." The tension, of course, arises in the reality: both narratives are true, depending on the narrator. Both storylines unearth historical fault lines that reflect the majoritarian view of who is an appropriate and deserving invitee into our melting pot and who should forever remain an "outsider."

Tensions abound in the internal affairs of nations with respect to matters that concern the movement of peoples across state borders, and the laws that govern these movements. A potential tension also exists between a state's sovereign prerogative to enact immigration laws and regulations that effect controls on such migrations on the one hand, and the limitations international human rights norms place on states' unfettered powers to promulgate such controls. The breadth of the possible strains is great, ranging from the preconditions a state may set to allow persons to cross its borders, to permit persons to stay within its borders, and to dictate what rights non-citizens within its borders—both legally and illegally—may enjoy.

The *American-Arab Anti-Discrimination Committee* decision (*American-Arab* or *AADC*) is the most recent U.S. Supreme Court pronouncement regarding the intersection of immigration regulations and fundamental constitutional rights enjoyed by foreign subjects present within the United States.[5] In *American-Arab*, the U.S. government commenced deportation proceedings against two legal permanent residents and six temporary visa holders on the basis of an ideological bias: the plaintiffs were alleged to be members of the Popular Front for the Liberation of Palestine (Popular Front or PFLP)—a charge all the plaintiffs denied.[6] The Supreme Court's

5. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999), *vacating and remanding* 119 F.3d 1367 (9th Cir. 1997); American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989), *aff'd in part, rev'd in part*, American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991).

6. *See* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 Geo. Immigr. L.J. 51, 73 (1999) ("Stripped to their essence, the government's charges amounted to a claim that the aliens read or distributed pro-Palestinian literature linked to the Popular Front . . . . All eight denied membership in the PFLP."). *See also* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (1997) (including the PFLP on the list of terrorist organizations).

ruling endorsing the legality of the government's deportation actions wholly eviscerated non-citizens' First Amendment rights. In Justice Scalia's oft-quoted words, "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[7] This decision departed from the domestic trend of granting foreigners—both legally and illegally present within the United States—constitutional protections,[8] particularly in First Amendment cases.[9] Moreover, the Supreme Court's *AADC* ruling does not even consider the impact of the government's action in denying and violating existing international human rights protections of free speech and association, equality, and non-discrimination.

This Article suggests that the *American-Arab* holding is a draconian nativistic assault on the rights of foreigners—rights that are separately and independently protected by international human

---

7. *American-Arab*, 525 U.S. at 491–92.

8. *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 596–97 n.5 (1953) (Murphy, J., concurring) (acknowledging that the Supreme Court has recognized foreigners' entitlement to constitutional protections included in the Bill of Rights when these are not limited, by their specific wording, to citizens) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945)).

9. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (higher scrutiny in First Amendment cases); *Kwong Hai Chew*, 344 U.S. at 596–97 n.5 (no "distinction between citizens and resident aliens" is permitted by the First Amendment) (Murphy J., concurring) (quoting *Bridges*, 326 U.S. at 161); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (higher scrutiny with First Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (suggesting that when the First Amendment is involved, a higher level of scrutiny will apply—"[f]reedom of speech and of press is accorded aliens residing in this country"); *American-Arab*, 70 F.3d at 1063; Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986) (vacating and remanding for reconsideration of visa denials to political figures), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (per curiam); Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986) (enjoining Secretary of State from denying right of the Permanent Observer of the PLO at the UN to travel to participate in debate about Middle East policies), *vacated without opinion*, 852 F.2d 563 (1st Cir. 1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985) (acknowledging U.S. citizens' standing to challenge on First Amendment grounds the denial of a non-immigrant visa to Hortensia Allende, widow of former Chilean President Salvador Allende; finding the United States' reason for refusing her a visa facially illegitimate). *See also* Rowoldt v. Perfetto, 355 U.S. 115 (1957) (rejecting communist affiliation as a basis for deportation of a resident foreigner, referring to the right of association as necessitating a high level of scrutiny).

rights norms, which the Supreme Court simply ignored in rendering its ill-founded decision. To develop this thesis, Part II presents the facts of this thirteen-year old legal labyrinth that are key to a human rights analysis. Part III briefly provides an historical background of the United States' perspective on the rights of immigrants. Following, in Part IV, a human rights critique of *American-Arab* first identifies documents pertinent to an international human rights analysis and then reviews the myriad human rights bases upon which the Supreme Court's decision can be challenged. I conclude that the decision is grounded upon factors—nationality, race, and ethnicity—that are improperly and illegally discriminatory both under United States domestic law and well-established international human rights norms, as well as on prohibited limitations on the rights to free speech and association. Notwithstanding sovereign prerogatives of states, sovereigns must be both internally consistent in the application of their domestic immigration restrictions and must apply these restrictions in accordance with international human rights pronouncements.[10] The *American-Arab* decision is flawed as it breaches both of these fundamental premises.

## II. FACTUAL BACKGROUND

The *American-Arab* case arose from the decision of the Immigration and Naturalization Service (INS) to commence deportation proceedings against seven native Palestinians and one native Kenyan simply because the government disliked their political activities and judged them (both the people and the activities) to be undesirable. The specific tactic employed by the government in pursuit of their deportations was to allege they were members of a world-wide communist organization—a charge that at the time was in and of itself sufficient to commence deportation proceedings because of the

10. *See* Louis Henkin, *An Agenda for the Next Century: The Myth and Mantra of State Sovereignty*, 35 Va. J. Int'l L. 115, 118 (1994) ("The international community should reject by its refugee law . . . the notion that states maintain exclusive power over entry and presence in their territory as the very essence of their national sovereignty."); Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, *in* Immigrants Out!, *supra* note 4, at 254, 262–63 (urging the same regarding immigration controls). *See also* Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 Am. J. Int'l L. 117, 127 (1991) (coining the phrase the "carapace of national sovereignty" to explain its entrenched antiquity).

existence of the McCarran-Walter Act of 1952 (the 1952 Act or the McCarran Act), which expressly provided for the deportation of foreigners "'who advocate the economic, international, and governmental doctrines of world communism.'"[11] Pursuant to that INS strategy, in January 1987, the eight *American-Arab* plaintiffs were arrested at gunpoint in their suburban Los Angeles homes.[12] They subsequently were detained at maximum security prisons.[13]

In light of these extreme government actions, it is important to understand both the conditions surrounding the plaintiffs' presence within the United States borders and the political climate of the time. With respect to the plaintiffs, it is noteworthy that six of the *American-Arab* plaintiffs ("the six") were living in the United States under temporary student or visitor visas at the time the deportation case was filed.[14] The other two were permanent resident aliens.[15] Un-

---

11. American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1370 (9th Cir. 1997) (quoting 8 U.S.C. § 1251(a)(6)(D) (1988)). The McCarran Act provided for deportation:

> (D) Aliens . . . who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . .

McCarran-Walter Act of 1952, 8 U.S.C. § 1251(a)(6)(D) (repealed 1990).

12. *See* Jim Lobe, *Rights-U.S.: Immigrants' Free Speech Rights Threatened*, Inter Press Service, Feb. 26, 1999, at 1, *available at* 1999 WL 5947263.

13. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1052 (9th Cir. 1995).

14. In June 1987, two of the six applied for legalization under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), but were notified by the INS of a denial of the application because of its conclusion that they were excludable under the former 8 U.S.C. § 1182(a)(28)(F). The basis for the INS's decision was secret evidence the two applicants were not allowed to review. They sued challenging the use of such evidence on various grounds and the district court granted first a preliminary and, subsequent to an *in camera* review of the secret evidence, a permanent injunction based upon a violation of the Fifth Amendment's due process guarantees. *See* American-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365 (C.D. Cal. 1995). *See generally* Akram, *supra* note 6 (discussing secret evidence cases).

15. *See American-Arab*, 119 F.3d at 1370 ("'[T]he six' were living in this country under temporary student or visitor visas at the time that this case was filed. The remaining two, Hamide and Shehadeh, were permanent resident aliens.").

til the government's decision to get rid of these plaintiffs, there was no question as to the legality of their entry or their visas. None had any known prior criminal record. Significantly, the government's claimed visa violations were of a technical nature that, as a matter of historical reality, rarely get prosecuted.[16]

As to the political climate, it is interesting, and troublesome, that the arrest and detention took place just six months after President Ronald Reagan decided to create the Alien Border Control Committee (the ABCC), an interagency security task force run by the Federal Bureau of Investigations (FBI), Central Intelligence Agency (CIA), and Department of State. The Reagan Administration brought the task force into existence specifically to address immigration and terrorism, particularly to prevent terrorists from entering or remaining in the United States. The creation of the ABCC was pursuant to President Reagan's issuance of a secret National Security Decision Directive creating a National Program for Combatting Terrorism.[17] The ABCC's targeting of Palestinian activism—regardless of whether the activity was legal, even if it consisted of generally constitutionally protected conduct—was thinly veiled.[18] In a rhetorical sleight of hand, the anti-terrorism ABCC "was directed to develop ways to deport 'PLO activists who have violated their visa status,'" thereby transforming any and all PLO activism—legal and illegal activity alike—into nefarious terrorism.[19]

---

16. For example, "the INS has conceded that Amer [one of the eight] is the only alien that the Los Angeles INS office has sought to deport for taking too few credits as a student, even though many such students have been reported to the INS." *American-Arab*, 70 F.3d at 1056.

17. *See* Akram, *supra* note 6, at 93 n.242 (noting that the directive, although issued in 1986, "only became public as a result of a Freedom of Information Act request in the LA 8 litigation in 1989.").

18. *See id.* at 94 ("Among the plans of the Border Control Committee was an INS-created strategy called 'Alien Terrorists and Undesirables: A Contingency Plan.' This thirty-one page memorandum, which only came to light as part of the LA 8 litigation, suggests use of the McCarran-Walter Act to apprehend and detain aliens from designated countries—all of them, except Iran, being Arab countries.") (footnotes omitted); *id.* at 94 n.245 ("Nationals of the following designated countries were to be rounded up and apprehended: Algeria, Libya, Tunisia, Iran, Jordan, Syria, Morocco and Lebanon.") (citing Border Control Committee, INS, Alien Terrorists and Undesirables: A Contingency Plan (1986)).

19. David Cole, *Terrorist Scare (Guarding Against PLO Terrorism and Activism)*, The Nation, Apr. 19, 1999, at 1, *available at* 1999 WL 9307024.

The charge against the plaintiffs was simultaneously brilliantly sneaky and morally disturbing: the plaintiffs were affiliated with the Popular Front, an international organization with ties to Palestine. More specifically, in addition to charging the six with non-ideological, technical visa violations,[20] the INS, claiming that the Popular Front advocated "world Communism,"[21] initially charged all the plaintiffs under the McCarran Act's specific provisions banning those who advocate communism from the U.S. shores.

Two factors are significant in the analysis of these charges. First, contrary to the INS's wholesale identification of the Popular Front with illegal, undesirable—indeed terrorist—activity, "the district court concluded [that the Popular Front] is engaged in a wide range of lawful activities, including the provision of education, day care, health care, and social security, as well as cultural activities, publications, and political organizing."[22] Notwithstanding the district court's findings, and without even disputing them, the government continued its tireless effort to seek deportation of all plaintiffs, insisting that the Popular Front is an international terrorist and communist organization.[23]

Second, the congressional testimony of William Webster, a former director of the FBI, plainly reveals that the plaintiffs' arrest was based upon the allegation that their membership in the Popular Front, stated to be a communist organization, rendered them deportable under the McCarran Act. Mr. Webster also confessed that if the plaintiffs had been U.S. citizens, no grounds would have existed for the arrest.[24]

On April 23, 1987, only four days prior to the district court's hearing on a motion for a preliminary injunction, the INS dropped

---

20. *See* 119 F.3d at 1370.

21. *See* Cole, *supra* note 19, at 1.

22. 119 F.3d at 1370 (internal quotation omitted).

23. *See id.*

24. *See id.* ("Former FBI director William Webster testified to Congress that '[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation .... [I]f these individuals had been United States citizens, there would not have been a basis for their arrest.'" (quoting *Hearings Before the Senate Select Comm. on Intelligence on the Nomination of William H. Webster*, 100th Cong., 1st Sess. 94, 95 (1987), *quoted in* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1053 (9th Cir. 1995))) (modifications in original).

the ideological charges against the six altogether and reformulated the 1952 Act charges against the permanent residents.[25] However, shortly after dropping the charges, the INS regional counsel confessed the twisted truth when he indicated "'that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP.'"[26]

After the initial charges, Congress legislatively repealed the 1952 Act—a repeal of the ideological exclusion provisions[27] that was, in part, a response to the *American-Arab* district court decision that such provisions were unconstitutional.[28] Such congressional action rendered the charges of communism insufficient and improper grounds for the government's desired deportations. Thus, the INS began proceedings against the two permanent residents under the "terrorist activity" provision of the Immigration and Nationality Act of 1990 (Immigration Act of 1990),[29] which rendered unclear the

---

25. *See id.*

26. *Id.* at 1370 (quoting *American-Arab*, 70 F.3d at 1053).

27. *See* Immigration and Nationality Act of 1990 (Immigration Act of 1990 or INA) § 212(a)(3), 8 U.S.C. § 1182 (a)(3) (1994 & Supp. IV 1998).

28. *See* American-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365 (C.D. Cal. 1995).

29. *See* American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1370 (9th Cir. 1997); Immigration Act of 1990 § 602(a), *amended by* 8 U.S.C. § 1251(a)(4)(B) (1994) (rendering deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity"). The Immigration Act of 1990 defines "engage in terrorist activity" as: "to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time." INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (1994). *But see* INA § 212(a)(3), 8 U.S.C. § 1182(a)(3)(C)(iii) (1994) (aliens cannot be denied visas based on ideology, affiliation or membership). Specifically, the provision provides that "an alien . . . shall not be excludable . . . because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States . . . ." Immigration Act of 1990, § 601(a), 8 U.S.C. § 1182(a) (1994), *amending* INA § 212(s), 8 U.S.C. § 1182(a) (1988). It is noteworthy that officials of the PLO are excepted from the provision. INA § 212(a)(3). To be sure, the amended law still permits the exclusion of aliens whose goal in entering the United States is "to engage solely, principally, or incidentally in: (i) any activity (I) to violate any law of the United States relating to espionage or sabotage . . . (ii) any other unlawful activity; or (iii) any activity a purpose of which is the opposition to, or the control or overthrow of the Government of the United States by force, violence, or other unlawful means." INA § 212(a)(3)(A)(i)–(iii), 8 U.S.C. § 1182(a)(3)(A)(i)–(iii) (1994). Moreover, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) permits the exclusion of any foreigner who "is a member

status of the deportation proceedings based on membership in an organization that advocates unlawful killing of governmental officials as well as unlawful damage or destruction of property.[30] The six were charged with the technical visa violations. All the plaintiffs then filed an action in federal court to challenge the deportation proceedings based on First Amendment grounds. The plaintiffs claimed that the INS had singled them out for selective enforcement of the immigration laws in retaliation for their constitutionally protected associational activity, i.e., their membership and participation in activities of the Popular Front.[31]

After the selective enforcement claim went through various hearings in the district court and the court of appeals, all the *American-Arab* plaintiffs preliminarily prevailed with their constitutional challenge and obtained injunctions against the government's attempt at selective deportation.[32] In the course of these lengthy proceedings, however, and in the midst of inflammatory nationalist passions and embarrassingly hateful anti-immigration sentiments, the U.S. immigration laws were dramatically revamped. The new laws reflected the nativist animus that permeated the "American" environment.[33]

The government seized the moment and took advantage of the popular climate being not only anti-immigrant but also virulently anti-Palestinian[34] to expand its deportation case against the *Ameri-*

---

of a foreign terrorist organization . . . ." INA § 212(a)(3)(B)(i)(IV)–(V), 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)–(V) (Supp. IV 1998), *amended by* AEDPA, Pub. L. No. 104-132, § 411, 110 Stat. 1214, 1268 (1996). The INA specifies only the PLO as engaging in terrorist activity. INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i) (Supp. IV 1998). It is also significant that critics suggest that the United States has discriminated against Arabs in applying the terrorist exclusion, as "Palestinians are the only group ever prosecuted for their activities under the current provisions of terrorist exclusion laws." Akram, *supra* note 6, at 94.

30. *See* 70 F.3d at 1054 n.4 (citing the former 8 U.S.C. § 1182(a)(28)(F) (1988)).

31. *See* American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1370 (9th Cir. 1997).

32. *See id.* at 1370–71.

33. *See generally* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. Cal. L. Rev. 547 (1998) (examining the clear nativism animus for the new "reforms"). This seemed to be, at the federal level, the continuation of the anti-immigrant trend reflection in California's Proposition 187. *See infra* note 60. *See also* Hernández-Truyol, *supra* note 10, at 254 (critiquing federal and state immigration reform initiatives as being alarmingly nativistic).

34. *See* Akram, *supra* note 6, at 95.

*can-Arab* plaintiffs. The INS continued to assert that the deportation proceedings were initiated for permissible reasons and insisted that under applicable First Amendment standards the plaintiffs could be deported for their behavior (i.e., their association with the Popular Front). Beyond those arguments, however, the government also added a brand new claim, challenging the federal courts' jurisdiction to even so much as review its deportation action. Specifically, the INS contended that the amendments to the immigration laws stripped the federal courts of jurisdiction altogether with respect to claims such as those at issue in *American-Arab*, except on review of final deportation orders which, in this case, had yet to be issued.[35]

The Ninth Circuit rejected outright the government's jurisdiction-stripping argument.[36] The circuit court concluded that while the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[37] applied retroactively, the courts nevertheless had jurisdiction to provide injunctive relief with respect to the selective prosecution action and the resulting claims of violations of the plaintiffs' constitutional rights.[38] The circuit court also found that evidence presented by the government of plaintiffs' fund-raising activities did not by itself warrant reconsideration of the injunction, but also that, in support of their injunction, the permanent resident plaintiffs had established that the government's selective prosecution had a disparate impact on them vis-à-vis other similarly situated foreigners.[39] Finally, the court decided that with respect to the permanent resident foreigners, the government had a discriminatory motive in instituting deportation proceedings against them which supported issuance of an injunction.[40]

The Supreme Court decision overturned the well-reasoned and factually supported decisions below. Its simplistic conclusion finding that "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terror-

35. *See American-Arab*, 119 F.3d at 1371.

36. *See id.*

37. 8 U.S.C. § 1252 (Supp. IV 1998).

38. *See American-Arab*, 119 F.3d at 1372–73.

39. *See id.* at 1374–76.

40. *See id.* at 1376.

ist activity"[41] disregards precedent that had confirmed non-citizens' enjoyment of the constitutional rights of free speech and association and flies in the face of universally accepted human rights norms. This conclusion, together with the Court's decision that the exclusive jurisdiction clause of the IIRIRA deprived the federal courts of jurisdiction, are draconian pronouncements that endanger non-citizens' constitutional rights—both substantive and procedural—contrary to our own legal history[42] and in derogation of human rights norms.[43]

## III. THE LEGAL BACKDROP

This part, in two sections, presents the historical backdrop against which to view and deconstruct the *American-Arab* decision. The first section provides a brief recount of nativism throughout the history of the United States. The second section analyzes the evolution of rights accorded and denied to immigrants within these U.S. borderlands.

### A. Nativism Throughout U.S. History

In *American-Arab* the Supreme Court decided issues of both substance and procedure. The decision's adjudication of the substantive selective deportation claims came much as a surprise for two reasons. One, as this Article discusses below, it is contrary to the existing jurisprudential trend to recognize constitutional rights of *persons* in U.S. territory. Two, the Court had expressly told the parties to the *AADC* litigation that it would not consider or decide the selective deportation issue and even had prohibited the parties from addressing the issue in their papers.[44]

The Supreme Court's decision is contrary to our historical (at least ostensible) meta-narrative of the United States' embrace of all immigrants.[45] After *American-Arab*, Lady Liberty's popular welcome-

41. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999).

42. *See infra.* Part III.

43. *See infra.* Part IV.

44. *See* Cole, *supra* note 19, at 2.

45. Of course, the historical "welcomeness" narrative is only one possible interpretation. There also exists ample evidence to label our immigration history as an exclusionary narrative, the message of which is one of unwelcomeness. *See* Hernández-

ness message officially seems to ring true no longer. Indeed today, the reality of our immigration environment is that we send back the tired and the poor and the huddled masses yearning to breathe free right along with the homeless and the tempest tossed.[46] Dominicans, Haitians, and Chinese alike are intercepted at sea and their rickety rafts or over-crowded boats are turned back. It does not matter that such persons are risking their very lives to be part of this land of opportunity.[47] For none of these people do we lift our lamp beside the golden door. But mostly, we no longer welcome the wretched refuse of teeming shores—a wretched refuse we have coded as terrorists[48]—persons we also have racialized and nationalized by linking them to the Middle East.

In *American-Arab*, the Supreme Court has redefined terrorism to include associational activities as well as thoughts and words alone. In its zeal to evict those "others," it has redefined terrorism as "activism for political causes" even if such eviction means sacrificing precious, and fundamental, constitutional rights.[49]

---

Truyol & Johns, *supra* note 33, at 549–50, 552–63. The 1996 IIRIRA, the procedures of which are at issue in the *American-Arab* case, is an example of the unwelcomeness narrative. *See supra* note 37 and accompanying text.

46. *See* Lazarus, *supra* note 1.

47. Very recently a boat, 60 feet long and about 25 feet wide, filled with 411 people (16 Dominican, two Chinese, and the rest Haitian) spent an estimated five days at sea before it ran aground about a mile from the coast of Florida. Only four of the passengers, three of them pregnant women, made it to U.S. soil having been brought to shore for medical reasons, and who, after treatment, were to be returned to their countries of origin. *See Emigrants Sent Home*, Associated Press, (visited July 6, 2000) <http://more.abcnews.go.com/sections/world/dailynews/emmigrants000103.html>.

To be sure, Cubans have until recently, basically because of cold-war politics that still persist in response to Castro's Cuba, received preferential treatment under the U.S. immigration laws. *See* Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 Colum. Hum. Rts. L. Rev. 369, 391–93 (1994) (giving a brief history of Cuban migration). Still today, after recent changes, Cubans receive preferential treatment if they reach land. *See* Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966). The ferment of these politics was plain in the recent Elián González debate. *See infra* note 120 and accompanying text.

48. *See* Immigration Act of 1990 § 602(a), *amended by* 8 U.S.C. § 1251(a)(4)(B) (1994). *See also supra* note 29 and accompanying text.

49. The First Amendment rights of free speech and assembly are fundamental rights incorporated and absorbed into the Fourteenth Amendment. The Due Process Clause has been held to protect freedom of speech. *See, e.g.*, Fiske v. Kansas, 274 U.S.

In the last few years, anti-immigrant sentiments have become public and popular;[50] with the *American-Arab* decision their fervor has hit new heights.[51] Notwithstanding the grand and constructive role foreigners have played in the development, growth, and success of this country, nativistic animus toward more recent newcomers is fraying our constitutional fiber. Unfortunately, historical traces of nativism are too easy to find. In the play The Melting Pot, a Russian Jewish "pogrom orphan" glorified America, his new nation, thus:

> America is God's crucible, the great Melting-Pot where all the races of Europe are melting and reforming! Here you stand, good folk, think I, when I see them at Ellis Island, here you stand in your fifty groups, with your fifty languages and histories, and your fifty blood hatreds and rivalries. But you won't be long like that, brothers, for these are the fires of God you've come to—these are the fires of God. A fig for your feuds and vendettas! Germans and Frenchmen, Irishmen and Englishmen, Jews and Russian—into the crucible with you all! God is making the American . . . . [T]he real American has not yet arrived. He

---

380 (1927). The Due Process Clause has also been held to protect the freedom of assembly. *See* De Jonge v. Oregon, 299 U.S. 353 (1937).

50. *See* Hernández-Truyol & Johns, *supra* note 33, at 555–56. It is baffling that Patrick Buchanan, a third generation Irish-American, does not see the irony of his desire to keep immigrants out. During the 1996 presidential elections, the most vicious anti-immigrant attacks came from Buchanan who warned of a "foreign invasion" from Mexico and called for a five-year moratorium on legal immigration. *See* Louis Freedberg, *Labor Shortage Is Turning the Anti-Immigrant Tide*, S.F. Chronicle, May 12, 2000, at 2Z1, *available at* 2000 WL 6477326. Buchanan recently visited the town of Douglas, on the U.S.-Mexican border (the number one crossing place for Mexicans), where ranchers complained about "a slow motion invasion of undocumented immigrants." Buchanan, an invited guest speaker, characterized the situation as a "wholesale invasion of America" and a "wholesale violation of the rights of American citizens. . . . If I'm elected president," he pledged, "it will be stopped cold." 36 National Catholic Reporter, Feb. 18, 2000.

51. *See* Akram, *supra* note 6, at 81 (discussing racial/ethnic animus towards Arabs as institutionalized bias on the part of various government organizations, including the INS and FBI). *See also id.* at 112 n.335 (citing Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1980s (1986), who "suggest[] that 'racializing' is a process that involves a community treating some group as a different 'race' because of cultural and other attributes that are seen as different from those of whites"); *id.* (noting that "Arabs and Muslims can be characterized as being 'racialized' in this way through convenient labels of 'terrorism' and stereotyping by the media").

> is only in the Crucible, I tell you—he will be the fusion of all races, perhaps the coming superman.[52]

Although the earliest natives within the borderlands we now call the United States of America were the Indians, they were eventually outnumbered and overpowered by the mostly European settlers who immigrated to the so-called new world from places such as Great Britain, Germany, and Scandinavia.[53] Although in the 1890s a new tide of immigrants from eastern and southern Europe broke this Anglo/Saxon/Nordic cycle of western and northern European immigration, the shifting demographics of later immigrations can be held to account for early nativist trends in the United States.[54] The animus with which more recent newcomers were often greeted reflected cultural prejudice and intolerance, just like it does today.[55] For example, the Jews and (largely Catholic) Italians and Irish bore the brunt of early American nativism at the hands of their earlier European counterparts who often considered their southern and eastern brothers and sisters to be members of an inferior and beaten race.[56]

Much like the mistreatment of and maligning suffered by the Jews, the Italians, and the Irish—Catholic and Protestant alike—the defendants in the *American-Arab* case suffered (possibly unconscious)[57] racial, ethnic, and religious discrimination because of their

---

52. Israel Zangwill, The Melting Pot 33–34 (1939).

53. *See* Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 Fordham Urb. L.J. 1075, 1087 (1996).

54. *See id.*

55. *See id.* at 1088.

56. *See id.* As historian John Higham has noted, "[b]y western European standards, the masses of southern and eastern Europe were educationally deficient, socially backward, and bizarre in appearance." John Higham, Strangers in the Land: Patterns of American Nativism 1860–1925, at 65 (2d ed. 1988). Italians were referred to as "Dagos" and "WOPs" ("without papers") and were sometimes victims of lynching parties, mob beatings, and riots. *Id.* at 91. The Irish immigrant was equally humiliated with common "No Irish Need Apply" phrases accompanying employment adds in many major cities. *See* Dan Lacey, The Essential Immigrant 61 (1990). Similarly, Jews faced private discrimination in schools, associations, and residential housing; Jews also were not allowed to vote in some states until the mid-1800s. *See* Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 88 (1989).

57. For a fuller discussion of "unconscious racism," see generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). Given media and governmental association of Arabs with terrorist activity, Lawrence's reflections on unconscious racism find a parallel in

Palestinian identification and activism. Since the early days of our republic there have been, and continue to be, ethnic, religious, cultural, and economic aspects of nationalistic and nativist ideology, anti-foreigner, and anti-immigrant sentiments.[58] Significantly, these prejudices extend not only to foreigners but also to native born citizens who are rendered "foreign" by virtue of their racial, ethnic, or linguistic traits which make them different from the "true" Americans.[59] Recent legislation such as California's proposition 187,[60] quo-

---

this context. As Lawrence puts it: "[T]he culture—including, for example, the media . . . and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world." *Id.* at 323.

58. *See* Hernández-Truyol, *supra* note 53, at 1090–91. *See also supra* note 56 and accompanying text.

59. For example, Puerto Ricans, whether born on the island or in the continental United States, unlike native born Asians, are citizens of the United States. *See* The Jones Act, ch. 145, 39 Stat. 951 (1917), *codified at* 48 U.S.C. § 733 (1994). Section 5 of the Jones Act declared and deemed all citizens and natives of Puerto Rico citizens of the United States unless within six months of the effective day of the Act they opted to retain their "present political status." Nevertheless, they are "othered" because of their racial, ethnic, or linguistic characteristics. *See* Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 Asian L.J. 19, 23 & n.18 (1997) (discussing the personal experiences of his Asian American family, including an anecdotal account of the family's concern that citizenship documentation be in order for travel to Canada at a border where officials do not generally request passports and birth certificates from white Americans or Canadians). *See generally* Kevin R. Johnson, How Did You Get to Be Mexican? A White/Brown Man's Search for Identity (1999).

60. Proposition 187, Section 1, "Findings and Declaration [of the People of California]" provides, in pertinent part, as follows:

> That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state.
>
> That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state.
>
> . . .
>
> Therefore, the People of California declare their intention . . . to prevent *illegal aliens* in the United States from receiving benefits or public services in the State of California.

(emphasis added). *See* League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997). Significantly, the use of the clearly derisive term "illegal alien" is not grounded in law. *See* Elizabeth Bogen, Immigration in New York 50–51 (1990) ("The term '*illegal alien*' exists nowhere in immigration law or in any other U.S.

tas,[61] and exclusions[62] are the modern day alien and sedition acts,[63] literacy tests,[64] and bans on foreign language use.[65]

With the *American-Arab* decision, the Supreme Court, Congress, and the Executive Branch join in the embarrassing litany of nativistic animus forming a national history of occidentalist exclu-

---

law. It is strictly a colloquial term, used to describe a spectrum of aliens . . . whose claims to legal status vary from virtually hopeless to almost certain. The term is misleading in that it suggests a pervasive flouting of the rules, which is far from common practice among the country's aliens . . . . The term *'illegal'* is also misleading in that it suggests a criminal immigration status. Technically, unauthorized presence in the United States is a civil offense, not a criminal one. In theory, it is not punishable by the criminal penalties of imprisonment or fine.") (emphasis added).

61. *See* The Immigration Act of 1924 (Permanent National Origins Quota Act), ch. 190, 43 Stat. 153 (repealed 1952) (allotting a certain percentage of immigrant visas to groups based on their presence already in the U.S. that clearly was an attempt to maintain the status quo).

62. *See* Immigration and Nationality Act, ch. 477, § 212(a)(1), 66 Stat. 163, 182 (1952) (repealed 1965). This law was enacted to exclude "undesirables"—the feeble-minded. Later, Congress substituted "mentally retarded" for "feeble-minded." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15, 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(1) (Supp. IV 1998)). *See also* INA § 212(a)(8), which was enacted to exclude "paupers & vagrants." 8 U.S.C. §1182(a)(8) (1994). There are numerous other classifications of aliens ineligible for immigration visas and admission which are still on the books, including the exclusion of sexual deviants, drug addicts and alcoholics, those affected by certain diseases and disabilities, illiterates, anarchists, Communists, criminals, polygamists, and those coming to engage in "any immoral sexual act" or likely to become public charges. INA § 212.

63. *See* Alien and Sedition Act, Sess. II, ch. 74, 1 Stat. 596 (1798) (expired 1801) (denying summarily the entry of anarchists and communists, as well as others who bore undesirable thoughts and associations).

64. *See* Immigration Act of 1917, 39 Stat. 874, 877, 8 U.S.C. § 136 (1946), *repealed by* 66 Stat. 279, 280 (1952) (calling for a literacy test for immigrants). *See also* Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 Geo. Immigr. L.J. 747, 755 (1997) (noting that in order to restrict immigrants from Southern and Eastern Europe, Congress enacted a provision requiring a literacy test for immigrants under this act).

65. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating under rational basis review a state law provision that prohibited the teaching of any subject in any language other than the English language, or the teaching of languages other than the English language to pupils who had not passed the eighth grade). *See also* Knapp, *supra* note 64, at 755 (relating a well-documented example of discrimination on the basis of language where a proclamation issued by the Governor of Iowa summarily banned the use of foreign languages—"[i]t banned the use of foreign languages in public and private schools, in church services, and even in conversations in public places or over the telephone").

sion and anti-orientalist persecution. Now the highly revered constitutional right to free speech has joined the grocery list of social services[66] that can be denied even to those who are legally present within these shores. As will be discussed in the section that follows, this constitutes an undesirable departure from the Court's own jurisprudence.

## B. A Brief Review of Immigrants' Rights

It should not be the subject of serious debate that foreigners in the United States have been able to, and *should* be able to enjoy certain constitutional guarantees.[67] Indeed, the Supreme Court's own decisions—some over a century old and some as recent as within the last decade—have concluded that constitutional provisions that refer to persons, rather than citizens, such as the rights contained in the Bill of Rights, are enjoyed alike by citizens and non-citizens who are within the U.S. borders.[68] Of particular relevance to *American-Arab*

---

66. *See* Hernández-Truyol & Johns, *supra* note 33, at 561 (noting the ineligibility of certain documented aliens to share in public benefits, such as AFDC, food stamps, Medicaid, and Social Security). *See generally* Personal Responsibility and Work Opportunity Reconciliation Act § 402, 110 Stat. 2105, Pub. L. No. 104-193 (1996).

67. *See* Restatement (Third) of the Foreign Relations Law of the United States § 722 (1987). The Restatement clearly provides:

> An alien in the United States is entitled to the guarantees of the United States Constitution other than those expressly reserved for citizens.
>
> Under Subsection (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinctions between aliens and citizens, or between different categories of aliens.

*Id.*

68. *See* Plyler v. Doe, 457 U.S. 202, 215 (1982) ("Use of the phrase 'within its jurisdiction' thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State . . . . That a person's initial entry into a State, or into the United States, was unlawful . . . cannot negate the simple fact of his presence within the State's territorial perimeter."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction . . . .").

is the First Amendment of the Constitution, which ensures *people*, not just citizens, the rights of free speech and assembly.[69]

On the other hand, our Constitution and laws also establish the legality of treating citizens and non-citizens differently.[70] Because the focus of this Article is the relationship and impact of the human rights regime on our domestic law, particularly the *American-Arab* decision, it is appropriate to explore the justification, pursuant to international legal principles, for making such differentiations.

Over a century ago, in *Nishimura Ekiu v. United States*,[71] the United States Supreme Court held that

> [i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[72]

Flowing from this notion is the principle that the federal government has preemptive, unfettered regulatory power over the exclusion of others or outsiders based on the foreign relations power.[73]

---

69. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the *people* peaceably to assemble . . . ." U.S. Const. amend. I (emphasis added).

70. *See* U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. Const. art. II, § 1, cl. 5 ("No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."); U.S. Const. amend. XII ("[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."); U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . ."); U.S. Const. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . . .").

71. 142 U.S. 651 (1892).

72. *Id.* at 659.

73. *See* Henderson v. Mayor of the City of New York, 92 U.S. 259, 273 (1875) (explaining that a state tax scheme imposing a head tax on immigrants nullified using the commerce clause and emphasizing that regulation of immigrants "is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the

Based upon the primacy of the executive and legislative branches of the federal government in matters pertaining to foreigners, the judiciary consistently defers to federal regulation and, in almost all cases, has accepted as permissible federal immigration classifications.[74] This deference model, established over a century ago when the Court upheld the right of Congress to exclude a foreigner who not only had been lawfully admitted to the United States but who also had been assured of his right of return,[75] was followed by the Court in *American-Arab* to a frightening—and impermissible—degree. Interestingly, as a country, a century after *The Chinese Exclusion Case*, we are still fretting about the hordes of "others/outsiders" seeking to crowd us out of our country. Now, it seems, we are also fretting about the hordes who we imagine and fear want to terrorize us within our own borders.

Indeed, the *AADC* Court, in deference to Congress, seems to pay no mind to either of two well-settled concepts. One, exclusion and deportation warrant different levels of scrutiny because case law has established that persons already present within the jurisdiction should have constitutional guarantees more readily and fully avail-

---

rule be established by treaty or by legislation"); Chy Lung v. Freeman, 92 U.S. 275, 277 (1875) (shipmaster bond to be posted only by those designated by the California Commissioner of Immigration such as lunatics, paupers, probable public charges, or "lewd or debauched women" stricken by Court, which confirms states are precluded from passing laws in matters that implicate foreign relations). For a discussion of the role of the foreign relations power in immigration, see Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int'l L. 201 (1994). For a discussion of other federal grounds, beyond the foreign relations power, for "continuing the primacy of federal preemptory immigration authority," see Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 Va. J. Int'l L. 217, 220 (1984). Professor Olivas lists other sources such as the Supremacy Clause (U.S. Const. art. VI, cl. 2), which implicates the treaty power; the Commerce Clause (U.S. Const. art. I, § 8, cl. 3); the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18); and the Naturalization Clause (U.S. Const. art. I, § 8, cl. 4). *See id.* at 223.

74. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–11 (1953). The Court even stated that if the alien could not be deported because there was no country that would receive him, he could be indefinitely detained. *See id.* at 215–16. The Court recognized the "power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 210.

75. *See* The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606 (1889) (congressional act seen as "conclusive upon the judiciary").

able than those who are seeking to "enter" the jurisdiction.[76] Two, the *AADC* case flies in the face of precedent firmly establishing that foreigners within the United States are entitled to constitutional protections—both procedural and substantive.[77] *American-Arab* transports the language and spirit of *The Chinese Exclusion Case* back from the past. There, the Court plainly stated that:

> [t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.[78]

A few years after *The Chinese Exclusion Case*, the Supreme Court reiterated such a deferential approach, confirming that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance."[79] In 1976 the Court's decision in the watershed case of *Matthews v. Diaz* exhibited great deference to congressional desires when, faced with a due process challenge to a congressional provision distinguishing between classes of aliens, the Court concluded that it was permissible not only to distinguish between citizens and non-citizens, but also between classes of non-citizens regarding eligibility for the Medicare supplemental insurance program.[80] More recently, in *Sale v. Haitian*

---

76. *See generally* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). *See also* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 Colum. Hum. Rts. L. Rev. 431, 437–38 (1997) (positing rejection of the plenary power doctrine in the deportation context based on a recognition that "illegal aliens" have substantive rights outside Congress's "immigration power").

77. *See generally American-Arab*, 525 U.S. 471 (1999).

78. 130 U.S. at 606.

79. Ting v. United States, 149 U.S. 698, 707 (1893) (upholding an act of Congress allowing deportation of Chinese workers under Chinese exclusion laws).

80. 426 U.S. 67 (1976). In this case the Court heard a Due Process Clause challenge to 42 U.S.C. § 1395o(2), a provision that denied eligibility for enrollment in the Medicare SSI program to foreigners unless they had not only been admitted for per-

*Centers Council*,[81] the Court upheld the exclusion of Haitians by interdicting them on the high seas and returning them to Haiti without even affording them an opportunity to apply for asylum. In the first months of the year 2000, a boat with 400 persons, old and young, Haitian and Chinese, was similarly turned away.[82]

To be sure, this broad and long line of cases should not be interpreted to mean that Congress has limitless power to deny all constitutional protections to foreigners. In *Wong Wing v. United States*,[83] the Court concluded that the government could not, without so much as a trial by jury, punish foreigners with hard labor for violating immigration laws.[84] Similarly, the Court invalidated a regulation of the civil service commission barring resident aliens from most positions in the civil service.[85] However, it is significant, and perhaps foretelling of *American-Arab*, that in *Mow Sun Wong* the Court expressly provided that the federal government, based upon its sovereign power, could legislate matters that would constitute invalid regulations under the Equal Protection Clause of the Fourteenth Amendment.[86] A leading constitutional and international law scholar has concluded that "[t]he *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension."[87] The *American-Arab* decision provides support for this notion. The case "is abhorrent to free men [and women], because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt."[88] On the basis of stereotypes, xenophobia, paranoia, and racism it endorses the transmogrification of the plaintiffs into terrorists because of their beliefs, thoughts, and associations. Because of who they are,

---

manent residence but also had resided in the United States for a minimum of five years. 42 U.S.C. § 1395o(2) (1970). *See* 426 U.S. at 70.

81. 509 U.S. 155 (1993).

82. *See supra* note 47 and accompanying text.

83. 163 U.S. 228 (1896).

84. *Id.* at 235–37.

85. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

86. *See id.* at 100. It is also interesting to note that after this decision, the President issued an executive order excluding aliens from the civil service which has been upheld by the lower courts.

87. Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 Harv. L. Rev. 853, 859 (1987).

88. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting).

plaintiffs have no rights to free speech or association, which are well-established constitutional and international human rights.

## IV. A HUMAN RIGHTS APPROACH

The intimate relationship between international law and immigration is the foundation for the accepted maxim of international law that the inherent sovereignty of nations[89] forms the basis of a nation's right to pick and choose who will be allowed to enter its "dominion."[90] Indeed, in 1972 the Supreme Court reiterated that the United States' power to exclude foreigners was based upon "ancient principles of the international law of nation-states."[91] Regardless of

89. The historical concept of sovereignty is arguably at odds with increasing globalization. *See* Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 Ind. J. Global Legal Stud. 443 (1998) (discussing the impact of the Internet on traditional notions of territorial-based, nation-state sovereignty); Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 Ind. J. Global Legal Stud. 425, 427 (1999) (examining the "unitary State" assumption of international relations theory by showing how actors in regulatory regimes such as independent state agencies are playing an "'international role' within the domestic State apparatus"). *See also Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law*, 9 Am. U. J. Int'l L. & Pol'y 1 (1993); J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and Rules of Sovereignty in International Relations*, 48 Int'l Org. 107 (1994).

90. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

91. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). Contrary to this bold statement, the proposition appears to be of relatively recent origin. *See* James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 Am. J. Int'l L. 804, 809 (1983) (noting that "[b]efore the late 19th century, there was little, in principle, to support the absolute exclusion of aliens" and the "Biblical injunctions, which influenced the articulation of international law by 17th- and 18th- century publicists, favored free transboundary movement" (citations omitted)). *See also id.* at 810 (noting that Grotius listed among "things which belong to Men in Common" certain rights of foreigners); *id.* at 811 (noting that Francisco de Vitoria argued that freedom to migrate freely existed; Christian Wolf articulated a principle of free movement; and Pufendorf "similarly denied to the sovereign a right to exclude aliens"). *But see id.* at 812 (explaining that Vattel recognizes "[t]he sovereign may forbid entrance of his territory either to foreigners in general, or in particular cases . . . flow[ing] from the rights of domain and sovereignty").

the time to which we date any right of the state to exclude foreigners, the existence of a sovereign right to exclude—at least within constitutionally permissible parameters—is not a matter subject to dispute. However, the operative language here—"within constitutionally permissible parameters"—seems to be tested to its limit by the *American-Arab* decision.[92]

An intersection exists between a state's sacrosanct sovereign power and human rights norms. This intersection, and in particular the protection of fundamental human rights, I posit, creates limitations on the exercise of sovereign power even within the context of the state's constitutional parameters and of the state's immigration regulations.

As a general matter, the initial inquiry in evaluating the role of international human rights norms in light of domestic immigration regulations, and whether such human rights norms can effectively limit notions of sovereignty, is whether human rights norms are merely aspirational statements of moral goals or positive rules creating binding and legally enforceable rights and obligations. This initial inquiry is easy to satisfy in *American-Arab* because there are, at a minimum, three relevant international instruments, all of which have been embraced by the United States, that provide us with normative standards: the Universal Declaration of Human Rights (UDHR);[93] the International Covenant on Civil and Political Rights (ICCPR);[94] and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[95] The human rights norms contained in these instruments are fundamental and inalienable rights—rights essential to life as human beings.[96]

---

92. 525 U.S. 471, 486–92 (1999).

93. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR]. *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (enumerating the "appropriate sources of international law").

94. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

95. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Treaty Doc. No. 95-2, 660 U.N.T.S. 195 [hereinafter CERD].

96. *See* Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, *in* 1 Women and International Human Rights Law 3, 5 (Kelly D. Askin & Dorean M. Koenig eds., 1999) (proclaiming that human rights are "fundamental, inviolable, interdependent, indivisible, and inalienable

International human rights law guarantees everyone—citizens and non citizens alike—these basic and fundamental rights.[97] As international law is part of the law of the United States,[98] it provides, beyond the constitutional critiques, additional bases upon which to mount challenges against the *American-Arab* decision. In this last part of the Article, I will discuss the various international human rights violations effected by the *American-Arab* decision. At the outset, however, it is important that I elucidate my position with respect to the claim of sovereignty upon which the Untied States grounds its right to exclude the *AADC* plaintiffs. Human rights and humanitarianism, particularly in this age of globalization, require a reconsideration of outdated notions of unfettered state sovereignty that form the underpinnings of the United States position. State sovereignty—the idea that a nation has total and unbounded power to dictate norms within its territorial borders and with respect to all persons within those borders—is the heart of, and basic excuse for, a state's right to exclude persons from entering its borders. Sovereignty has become the very shield behind which the United States historically has justi-

---

rights"); Rebecca M. Wallace, International Law 175 (1986) ("Human Rights . . . are regarded as those fundamental and inalienable rights which are essential for life as a human being.").

97. *See* UDHR, *supra* note 93, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . . ."); ICCPR, *supra* note 94, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.").

98. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). It has been a century now since the Supreme Court held in *The Paquete Habana* that customary law is the law of our land:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

175 U.S. 677, 700 (1900). *See also* Hernández-Truyol, *supra* note 10, at 259 (explaining that "human rights obligations assumed by the United States under treaties as well as those that arise pursuant to custom . . . are legally enforceable within the United States by states as well as individuals.").

fied laws that effect the exclusion of persons from its shores—either at entry point or, as manifested in *American-Arab*, by deportation of those legally present, even permanent residents. The notion of sovereignty as unfettered state power has historically justified, and continues to be the rationale for, the passage of laws such as the 1996 so-called welfare and immigration "reform" laws that in the end simply serve to deprive non-citizens of some of the most precious and fundamental incidents to any level of membership in "American" society. A reconceptualized relationship of human rights to nationhood would effect a dramatically different result. In such a vision state sovereignty would be repositioned so that the state remains subordinate to international human rights norms. Such restructuring effectively elevates human rights norms, policies, and enforcement mechanisms, both domestic and international, so that they provide effective substantive and procedural protections to individuals and groups whose rights have been violated.

## A. General Background

Because I mentioned CERD as one of the instruments that provides protection for the *American-Arab* defendants, I initially need to make two observations. The first observation is CERD's definition of the term "racial discrimination":

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[99]

This definition reflects the United States' paradigm as it racializes both ethnicity and nationality. As a corollary to this observation, it is important to note that the Supreme Court has concluded that Arabs constitute a race for purposes of constitutional protections.[100]

---

99. CERD, *supra* note 95, art. 1(1).

100. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, . . . he will have made out a [racial discrimination] case under § 1981.").

The second observation is that many of the United States' exclusions from the privilege of entering this nation's borders have been on ill-advised grounds such as race, ethnicity, and national origin—grounds that today would be prohibited based upon the United States' ratification of CERD.[101] So these immigration questions generally, and with respect to the *American-Arab* case specifically, go to the heart of the intersectionality debate surrounding international and domestic law.

This Article posits that human rights are supra-sovereign and cannot be trammeled by misguided (or the misguided application

---

101. Three examples expose the nation's basic concerns about, mistrust of, and exclusionary attitude towards racial or ethnic "others." An early example of nativist history and fear is embodied in the Chinese Exclusion Act of 1882, ch. 126. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943). In need of cheap labor, the United States encouraged Chinese workers to come to this country to build the railroad system. After workers had been seduced into our borders with the promise of work, the economic climate changed so they were no longer a desirable presence. The Chinese Exclusion Act thus was passed to impose restrictions on Chinese immigration and to require registration of all Chinese workers. The Supreme Court, bowing to the legislative will to keep the now-unwanted Chinese others from entering the U.S., even upheld the right of Congress to exclude a foreigner who not only had been admitted, but also had been promised that he would enjoy the right to return.

A second example is the Johnson-Reed Act of 1924. Act of May 26, 1924, ch. 190, 43 Stat. 153 (repealed 1952). The Johnson-Reed Act established a national origins quota with the goal of maintaining the white population's statistical dominance in the United States. The goal of retaining the racial and ethnic status quo was achieved by aligning immigrant quotas of these groups to national groups based on their pre-existing presence in the United States.

Finally, the general provisions of the recent welfare and immigration legislation disparately affect certain ethnic and racial minorities. *See* Hernández-Truyol & Johns, *supra* note 33, at 570–72; Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. Rev. 1509, 1541–58 (1995). For example, many provisions of the Illegal Immigration Reform and Immigrant Responsibility Act promote increasing border patrol personnel and equipment in order to make illegal entry from the Mexico-U.S. border more difficult. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 101–22, 110 Stat. 3009-546, 3009-553 to 3009-560 (codified in scattered sections of 8 U.S.C.). These provisions increase border patrol agents and personnel, improve barriers (specifically addressing fencing and road improvements at the border patrol area near San Diego, California), improve border technology (including requiring a machine-readable biometric identifier), and impose penalties for illegal entry and flight from checkpoints. Of course, of particular interest in this case is the targeting of Arabs by stereotyping them as terrorists. *See supra* note 51 and accompanying text. *See also* Akram, *supra* note 6, at 52 & n.5, 90–100 (discussing targeting of Muslims, Palestinians, and Arabs).

of) local laws. This position finds support in decisions ranging from Nuremberg[102] to the more recent pronouncements regarding Augusto Pinochet.[103] Following, I will address some of the specific human rights violated by the *American-Arab* case. First, however, I must emphasize that the specific human rights addressed below attach to *everyone*.[104] This designation is significant because the *travaux preparatoires*, much like earlier United States constitutional adjudications,[105] clearly reveal that the grant of rights to "persons" is broader than a grant of rights only to "citizens." Indeed, the *travaux* show that states considered, but rejected, granting conventional human rights to a narrower class of persons, i.e., citizens.[106]

More specifically, the comments of the Human Rights Committee (HRC) make plain that the ICCPR protects the rights of foreigners.[107] The HRC stated that "[i]n general, the rights set forth in the Covenant apply to everyone, irrespective of . . . his or her nationality . . . ."[108] Additionally, besides CERD's prohibition on racial discrimination, both the UDHR and the ICCPR have general non-

---

102. *See* The Nuremberg Trial, 6 F.R.D. 69 (1946) (passing judgment on some of those responsible for Nazi war crimes and crimes against humanity).

103. In the case of Pinochet's extradition, the seven judge panel of the House of Lords of the United Kingdom decided that Pinochet is not immune from prosecution and therefore may be extradited to Spain. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate, [2000] 1 App. Cas. 61 (House of Lords); Regina v. Bow Street Metropolitan Stipendiary Magistrate, [2000] 1 App. Cas. 119 (House of Lords).

104. *See* ICCPR, *supra* note 94, art. 18(1) ("freedom of thought, conscience and religion . . ."); *id.* art. 19 ("freedom of opinion and expression"); *id.* art. 21 ("right of peaceful assembly"); *id.* art. 22 ("freedom of association").

105. *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (recognizing that Bill of Rights protections for "persons" encompass persons who are not citizens).

106. *See Draft International Covenants on Human Rights*, U.N. GAOR 3d Comm., 16th Sess., 1103d mtg., U.N. Doc. A/C.3/SR.1103 ¶ 38 (1961). During the process of drafting and adopting Article 27 of the ICCPR, India proposed such an amendment, which was rejected.

107. *General Comment No. 15 of the Human Rights Committee on the Position of Aliens Under the Covenant: Report of the Human Rights Committee*, U.N. GAOR, 27th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/42/40 (1986) [hereinafter *HRC General Comment 15*], *reprinted in* M. Cherif Bassiouni, The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards 15 (1994).

108. *Id.* ¶ 1.

discrimination clauses[109] that, like CERD, prohibit discrimination on the basis of race, but also proscribe discrimination on the basis of "colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[110]

## B. Specific Protections

I have already suggested that the singling out of Palestinians (and the Kenyan) might constitute unlawful racial discrimination using both domestic and international legal principles. In this regard, even accepting for the sake of argument, without agreeing with the underlying principle, that citizens and non-citizens may be treated differently in some regards, the international protections against race discrimination would prohibit the singling out for selective enforcement of any law against particular persons based on their race.[111]

In *American-Arab*, the courts below had carefully considered the facts underlying the selective enforcement claim and had wholly rejected the government's contention that such claims were outside of the courts' purview simply because the government's decision implicates foreign policy concerns. The court plainly stated that "[a]lthough alienage classifications are closely connected to matters of foreign policy and national security, . . . the judicial branch may examine whether the political branches have used a foreign policy crisis as an excuse for treating aliens arbitrarily."[112] Quoting prece-

109. *See supra* note 97 and accompanying text.

110. ICCPR, *supra* note 94, art. 26. It is noteworthy that these grounds, although not sex, are covered in CERD's prohibition against racial discrimination as broadly defined to include "race, colour, descent, or national or ethnic origin," that impairs "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." CERD, *supra* note 95, art. 1(1). *See also id.* art. 5 (stating that the right to equality before the law is "without distinction as to race, colour, or national or ethnic origin").

111. With respect to CERD, the Supreme Court's treatment of the *American-Arab* plaintiffs effected racial discrimination because contrary to the Convention mandates, the Court has effected a "distinction . . . or preference based on race, colour, descent, or national or ethnic origin which has . . . the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political . . . [and] social, cultural or any other field of public life." CERD, *supra* note 95, art. 1(1).

112. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995) (internal quotation omitted).

dent that plainly stated "'the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine,'"[113] the court of appeals found that it was within its power to:

> review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake. . . . Contrary to the Government's suggestion, the foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country do not authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right.[114]

This analysis interconnects equality rights on the one hand with First Amendment guarantees on the other hand in the deportation context. It is significant that these rights—equality, speech, and assembly—are independently the subject of substantive human rights protections.[115] In *American-Arab*, the court found that former FBI Director Webster's confirmation that the plaintiffs were arrested because of the allegation that they were members of a communist organization, and Odencrantz's statement that the INS intended to deport all of the plaintiffs because of their membership in the Popular Front, established the impermissible motive in the plaintiffs' arrests.[116]

While that court saw the gravamen of the case as "the legal question whether aliens may be deported because of their associational activities with particular disfavored groups, or whether aliens who reside within the jurisdiction of the United States are entitled to

---

113. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 942–43 (1983)).

114. *Id.*

115. *See* UDHR, *supra* note 93, art. 18 ("freedom of thought, conscience and religion"); *id.* art. 19 ("freedom of opinion and expression"); *id.* art. 20 ("right to freedom of peaceful assembly and association"); ICCPR, *supra* note 94, art. 19(1) ("right to hold opinions without interference"); *id.* art. 19(2) ("right to freedom of expression . . . [which] shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . "); *id.* art. 21 ("right of peaceful assembly"); *id.* art. 22(1) ("right to freedom of association with others"); CERD, *supra* note 95, art. 5(d)(vii) (right to equal enjoyment of certain civil rights including "freedom of thought, conscience and religion"); *id.* art. 5(d)(viii) ("freedom of opinion and expression"); *id.* art. 5(d)(ix) ("freedom of peaceful assembly and association").

116. *American-Arab*, 70 F.3d at 1063.

the full panoply of First Amendment rights of expression and association,"[117] it looked only at domestic law.[118] Substantively, however, the rights to equality, free speech, and assembly are also protected by international human rights norms.[119] Moreover, while the Supreme Court appears wholesale to have rejected a non-citizen's claim to any First Amendment protections, its analysis cannot hold water either on free speech, equality/discrimination, or procedural fairness grounds. Indeed, a comparison of the activities of the plaintiffs with movements by Cuban exiles reveals the disparate treatment the plaintiffs received.

Cuban political groups' activities, in which both citizens and non-citizens alike engage, are not only tolerated and accepted, they are indeed respected, praised, and supported by the United States government—even in instances where their legality is questionable.[120] Consider, for example, the dramatically different treatment (as compared to the PFLP) received by the Cuban American National Foundation (CANF), a group focused on politics, the aim of which is to overthrow Castro's government.

It is without doubt that the CANF was actively involved in the controversy surrounding Elián González, the little boy who survived a risky trip from Cuba but whose mother did not.[121] His rela-

---

117. *Id.*

118. *See generally id.* (failing to mention the implication(s) that international law obligations may have on the Court's analysis).

119. *See supra* notes 97, 110, and 115 and accompanying text.

120. *See, e.g.*, Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997) (condemning unequivocally the Cuban Air Force's shooting down two of the *Hermanos al Rescate* (Brothers to the Rescue) planes).

121. The Elián González debate involved 6-year-old Elián—the Cuban boy found clinging to an inner-tube on November 25, 1999, after a boat he and his mother were on sank—and the controversy over whether he should be sent back to his father in Cuba or be allowed to remain with relatives in Miami. The INS ruled that Elián should be returned to Cuba. Elián's Miami relatives filed a political asylum claim on Elián's behalf in federal court, contending that Elián had a "well-founded fear of persecution" in Cuba if he returned. A well-founded fear can be on account of race, religion, nationality, political opinion, or membership in a particular social group. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1994). The issue in the case, besides the jurisdictional issue, was whether Elián's great-uncle, contrary to his father's wishes, had standing to speak on behalf of the boy on immigration matters. On March 21, 2000, Judge K. Michael Moore, U.S. District Judge in the Southern District of Florida, held that the court lacked jurisdiction to review the action of the Attorney General. *See* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000). *See also* Marjorie Cohn, *Pun-*

tives—distant relatives the child did not meet until November 1999 on Thanksgiving day when he was rescued by fishermen who found him hanging on to a piece of wood, dehydrated and almost unconscious—against INS orders and both domestic[122] and international[123]

---

*ishment Politics: Tug of War Over Cuban-Boy Refugee Is Symbolic of U.S.-Cuba Embargo Problems*, (visited July 5, 2000) <http://jurist.law.pitt.edu/forumnew2.htm>.

122. *See* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 Ariz. L. Rev. 11, 55 (1994) (noting that "[t]raditionally . . . the law has refused to recognize children as parties to any aspect of their parents' divorce proceedings, including the custody dispositions . . . [rather,] the law identifies a state interest in the child's "best interest"). Fitzgerald goes on to discuss *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993). Fitzgerald at 72–74. Significantly, the Michigan Supreme Court found that "[t]o permit a court to divest fit genetic parents of their custody rights because of its determination that some other set of parents would better serve the child's 'best interests' would be a dangerous slippery slope leading to the destruction of parents' constitutional rights." *Id.* (citing *DeBoer*, 502 N.W.2d at 666–67). See also the Uniform Marriage and Divorce Act, which states:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> the wishes of the child's parent or parents as to his custody;
>
> the wishes of the child as to his custodian;
>
> the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> the child's adjustment to his home, school, and community; and
>
> the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Uniform Marriage and Divorce Act § 402, 9A U.L.A. 147 (1987) [Best Interest of Child]

123. *See* Convention on the Civil Aspects of Child Abduction, Oct. 25, 1980, ch. 1, art. 3, T.I.A.S. No. 11670, 19 I.L.M. 1501. This convention states:

> The removal or the retention of a child is to be considered wrongful where—
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

law, insisted on retaining custody. Their claim was simply that they disapprove of Communism and Castro. There was no claim whatsoever that the father is unfit. Finally, the INS concluded that the boy should be in his father's custody. Ultimately, the father, as proper custodial parent, successfully recovered custody of his son and returned with him to Cuba. But it was not until he and his young family—his new wife and infant child—had to retain counsel and move to the United States as well as engage the judicial process through one state court and three federal court decisions—one District Court opinion and two Eleventh Circuit opinions, one temporary order prohibiting anyone from removing the child from the U.S. pending the final resolution of the case, and one final order.[124]

Congressional response to the Elián situation stateside is telling. Rather than voice concern at the family's failure to follow the rule of law, it considered passing a private bill to make the six year old boy, without the consent of his father, a U.S. citizen. Such a move was not only unprecedented, but wholly contrary to established norms.[125] This congressional coddling of persons flouting the rule of law, and the state court's issuance of a custody ruling in favor of the distant relatives—in contravention of the INS custody decision in this immigrant context, an area in which the plenary power doctrine has resulted in virtually uniform deference to the federal government[126]—reveals the inconsistent treatment of different groups.

---

> The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

*Id.* Interestingly, the United States is a contracting state to this convention whereas Cuba is not. *Id.*

124. *See generally* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).

125. *See* Letter from Michael Ratner, Skelly Wright Fellow at Yale Law School; Michael Wishnie, Assistant Professor at New York University School of Law; and Jules Lobel, Professor of Law at the University of Pittsburgh Law School, to The Honorable José Serrano and The Honorable Tom Campbell, Representatives of the United States House of Representatives (Jan. 24, 2000) (on file with author). This letter explains that imposing citizenship on Elián González without the consent of his father Juan González would be unconstitutional, contrary to U.S. immigration law and congressional rules, and a serious interference in the parent-child relationship.

126. Recently a commentator stated that "[t]he doctrine of 'plenary power' can be seen as the hole in the Constitution through which immigrants and aliens fall." Akram, *supra* note 6, at 58. The plenary power doctrine is judicially created and posits that the Constitution does not limit Congress or the executive in immigration matters

When, as in *American-Arab*, such inconsistencies are grounded upon proscribed classifications, including race, nationality, ethnicity, and even probably religion, they should be rejected.

The *AADC* decision effectively renders illegal political acts and associational groupings of Palestinians (and their non-U.S. citizen sympathizers) who urge changes in their country's governance. The case makes such actions legitimate and legal bases for seeking deportation. For purposes of this Article, suffice it for me to suggest the irony in, as well as to simply raise the different fashion in which, Cuban exiles' rights to free speech—such as criticizing the Castro regime, and even advocating its overthrow by violent means and seeking a return to them of their land—are protected.[127]

Another international human right that is significant in this case is the right to participate in one's culture and cultural activities.[128] Thus, beyond the human rights to equality, free expression, and association, given the factual findings of the courts below that the Popular Front is an educational, cultural, and social organization, the Supreme Court's ruling effects a nullification of the *American-Arab* plaintiffs' enjoyment or exercise on an equal footing of their right to participate in political, social, and cultural aspects of life. The articulation of this right in the ICCPR is especially important because the ICCPR implicitly recognizes that religious and ethnic minorities are particularly vulnerable to a tyrannical majority's

---

and that the courts will refrain from reviewing congressional or executive action in the field. *See generally* Nishimura Ekiu v. United States, 142 U.S. 651 (1892). The Court and commentators tend to point to *The Chinese Exclusion Case*, 130 U.S. 581 (1889), as the source of the doctrine. In upholding the McCarran Act ideological exclusions, courts often cite to the plenary power doctrine. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). For discussions of the plenary power doctrine, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925 (1995).

127. *See supra* notes 120–26 and accompanying text.

128. *See* UDHR, *supra* note 93, art. 27 ("right freely to participate in the cultural life of the community"); ICCPR, *supra* note 94, preamble; *id.* art. 27 (right "to enjoy [one's] own culture"); CERD, *supra* note 95, art. 5(e)(vi) ("right to equal participation in cultural activities").

whims in denying rights.[129] Given the lower courts' findings that the Popular Front is an associational group that engages in a wide range of lawful activities, including cultural activities and political organizing, the Supreme Court's conclusion that deportation based upon such an association is constitutional, while rather puzzling, nevertheless does not vitiate the separate human rights violations such a pronouncement effects. Applying the human rights perspective suggests that a deportation grounded upon a violation of human rights is impermissible and beyond the so-called sovereign power of the state.

Two other articles of the ICCPR are of particular importance in the context of the *American-Arab* case. First is article four of the ICCPR, which provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigency of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[130]

The significance of this passage lies in the fact that even in times of public emergencies, no racial discrimination is permissible. Moreover, the second subsection of article four of the ICCPR provides that under no circumstances can the suspension of rights under the public emergency exception derogate from article eighteen's protection of freedom of thought.[131] Given CERD's broad definition of racial discrimination, and considering that the *American-Arab* deportations are based on the plaintiffs' association with the Popular Front—a group that expounds beliefs that were unpopular but today are supported by the U.S. government, i.e., "support for an independent Palestinian state and respect for the human rights of Palestinians living

129. *See* ICCPR, *supra* note 94, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture . . . .").

130. *Id.* art. 4.1.

131. *Id.* art. 4.2.

under Israeli occupation"[132]—it becomes inescapable that the U.S. Supreme Court's decision effects a violation of the plaintiffs' human rights.

The other ICCPR article with particular significance to this case is article twenty. This provision is significant not only because of its content, but also because of what the United States has articulated with respect to its contents. Specifically, article twenty prohibits the dissemination of propaganda for war as well as "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence . . . ."[133] The United States took a reservation against article twenty because it objected to the impermissible constraints the article imposed on the sacrosanct right to free speech and association. Specifically, the U.S. reservation to article twenty provides that the article "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[134]

It is ironic that the United States would view the right to free speech and association as so significant that it takes a reservation against limitations that seek to outlaw hatred, yet completely eviscerates the meaning, application, and enjoyment of the right in the context of immigration.[135] Moreover, the Supreme Court majority's

---

132. *See Lawyer's Letter to Reno Urging Dropping of LA8 Case,* ADC Action Alert, (American-Arab Anti-Discrimination Committee, Wash., D.C.) (June 29, 1999), (visited July 5, 2000) <http://leb.net/bcome/activism/la-8-lawyers-letter.html> (noting that the pro-Palestinian views held by the L.A. Eight at the time of their arrest, ironically, were the crux of Mid-East peace negotiations by the U.S. government).

133. ICCPR, *supra* note 94, art. 20.

134. International Covenant on Civil and Political Rights, Senate Report on Ratification and Reservations, S. Exec. Rep. No. 102-23, at 11 (1992). In explanation, the U.S. wrote:

> Article 20 directly conflicts with the First Amendment by requiring the prohibition of certain forms of speech and expression which are protected under the First Amendment to the U.S. Constitution (i.e. propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence). The United States cannot accept such an obligation.

*Id.* at 10.

135. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999) ("When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him

actions, in light of the repeal of the McCarran Act, the new legal provisions prohibiting exclusion based on the foreigner's beliefs and associations if such beliefs and associations are lawful in the United States, and the Webster testimony that if plaintiffs had been U.S. citizens there would have been no grounds for prosecution, fly in the face of not only the international norms but also the United States' own articulated policies.

Indeed, with respect to the rights of speech and association, a surprising aspect of this decision is the background against which it appears. As Justice Ginsburg's opinion in *American-Arab* plainly notes, "[i]t is well settled that '[f]reedom of speech and of press is accorded aliens residing in this country.'"[136] Indeed, in *Bridges v. Wixon*,[137] the Court recognized that the protections afforded by the Bill of Rights are not limited by the Constitution to citizens, but rather extend to "persons," citizens and non-citizens alike. The provisions of the Bill of Rights "extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority."[138]

It is noteworthy that in the *American-Arab* proceedings the Ninth Circuit found it particularly important to protect immigrants' First Amendment rights because of the United States' unfortunate history of nativism.[139] The Ninth Circuit specifically held that it is "especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst."[140]

---

for the additional reason that it believes him to be a member of an organization that supports terrorist activity.").

136. *Id.* at 497 (Ginsburg, J., concurring) (quoting Bridges v. Wixon, 326 U.S. 135, 148 (1945)) (modification in original).

137. 326 U.S. 135 (1945).

138. *Id.* at 161.

139. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1064 (9th Cir. 1995) (explaining that "[a]liens, who often have different cultures and languages, have been subjected to intolerant and harassing conduct in our past, particularly in times of crises").

140. *Id.* at 1064 (citing *Bridges*, 326 U.S. at 149). *See also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 869 (1989) ("[D]eportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights.").

Similarly, Justice Ginsburg concluded that "[u]nder our selective prosecution doctrine, 'the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.'"[141] Consequently, although Justice Ginsburg agreed with the majority of the Court in noting that the Court had no jurisdiction to hear the case until the conclusion of the deportation hearing, she clearly recognized that deportation is a "grave sanction," and one that places "'the liberty of an individual . . . at stake . . . .'"[142]

These analyses of the importance of the First Amendment guarantees, while failed constitutional arguments, should be reconsidered as potentially successful positions in the context of human rights laws. It is significant in this case that protected constitutional and international human rights were trammeled without so much as a scintilla of evidence of any wrongdoing by any of the plaintiffs.[143] A reconsideration in light of human rights protections—protections that precedent as well as Ginsburg's opinion would also find in domestic law—should effect a repeal of the *AADC* Court's conclusions.

## V. CONCLUSION

A review of the facts and the circumstances surrounding the *AADC* case leads to the inescapable conclusion that the decision discriminates on the basis of race and nationality (against Arab and Palestinian individuals) and denies equal treatment with respect to the exercise of constitutionally protected activities—free speech and

141. *American-Arab*, 525 U.S. at 498 (Ginsburg, J., concurring) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

142. *Id.* at 497–98 (quoting *Bridges*, 326 U.S. at 154). *See* Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 161–64 (1996) (discussing the harshness of deportation as a sanction for the exercise of First Amendment rights).

143. These facts also raise the issue of possible violations of other protected international human rights such as guarantees against arbitrary detention and arbitrary deprivation of liberty. *See, e.g.*, UDHR, *supra* note 93, art. 3 ("Everyone has the right to life, liberty and the security of person."); *id.* art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); ICCPR, *supra* note 94, art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.").

association—to the plaintiffs vis-à-vis other similarly situated foreigners. Had the so-called "violations"—membership in a national group that "engaged in a wide range of lawful activities . . . [including] political organizing"[144]—been committed by persons belonging to a group to which the U.S. government is not predisposed to equate activism with terrorism, the conclusion would have been dramatically different. Such an analysis brings to life the myriad human rights violations effected by the *AADC* case: racial, religious, ethnic, and national discrimination, as well as discrimination in the applications and enjoyment of the rights to free speech and association.

As one commentator has noted, "[n]ew fears of terrorism combined with old-fashioned nativism lent public support to immigration and counter-terrorism laws,"[145]—the very laws that are being applied in the *American-Arab* case. The nativist underpinnings of the case are evident in some of the sources that form the background for the anti-immigrant, anti-terrorist legislation applicable in the *American-Arab* case and discussed earlier. Quite poignantly, as one of the counselors for the plaintiffs in *American-Arab* noted, "[t]he easy slide from 'terrorism' to 'activists' in the [alien border control] committee's mandate captures perfectly the Justice Department's views both then and now: To be an activist for an organization that engages in terrorism is to be a terrorist, no matter how peaceful one's activism is."[146]

In light of the proposed human rights analysis, it is clear that the Supreme Court decision itself—as an official action of the United States—effects human rights violations. Reconceptualizing sovereignty as a notion that is limited by fundamental human rights provides an opportunity for global rights to correct the local wrongs of the *American-Arab* decision.

144. American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1370 (9th Cir. 1997) (internal quotation omitted). *See supra* note 7 and accompanying text.

145. Wendy Kaminer, *Taking Liberties: The New Assault on Freedom*, 42 American Prospect 33, 36 (1999).

146. Cole, *supra* note 19, at 1.